indication that he wanted the said memorandum to subsist upon his demise. The question now is whether this Court should give effect to the expressed wish or desire of the deceased intestate in terms reflected in the said memorandum exhibit P1. In this regard, it may not be inappropriate to refer to a passage in the judgement of Blagden, J. in *Re Estate of Tay Lim Tiang: Tay Sok Ann v. Tay Sok Hiong & Anor.* [1955] SCR 17 which states:-

> ... the problem before the Court really resolves itself into deciding what is an equitable division of the Estate, bearing in mind so far as is allowable, the expressed wishes of the deceased, the rights and liabilities of the beneficiaries, the proper principles to be applied in administering an intestate's estate and the effect of any relevant chinese custom ...
>
> Although the will of Tay Lim Tiang has been declared invalid, nevertheless its existence as a document of record is clear evidence of the wishes of the deceased, expressed as it was before elders and notabilities of Simanggang ...
>
> I am satisfied that the proper course to take is to divide the estate as nearly as possible in accordance with Tay Lim Tiang's declaration expressed before the elders and evidenced by the document exhibit 'H', which, although invalid as a will under English law, is admissible in evidence as proof of a declaration under chinese custom ..."

I would adopt the stand taken in *Re Estate of Tay Lim Tiang, supra,* in the instant case because of the deceased Lu Hing Leng's expressed wish or desire to convey the said land to the plaintiff upon his demise and that on the evidence, it is reasonable to assume that his expressed wish or desire had continued to subsist on his death since he had made no attempt at all to revoke or amend the terms of the said memorandum exhibit P1 from the time he made it on 23 July 1972 until his death on 7 November 1983. Furthermore, it has not been shown that such an exercise would have gone against chinese custom or norms.

In the circumstances and for the reasons stated, I will order that the defendant do transfer the said land consisting of 4.76 acres and described as Bintangor Lease of Crown Land no. 23801 to the plaintiff within a reasonable time. Costs to the plaintiff to be taxed.

MBf FINANCE BERHAD

v.

EPCO MARINE SDN. BHD.

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY J.
[ORIGINATING SUMMONS 24 (31)-816-85]
15 APRIL 1994

PRACTICE & PROCEDURE: Order 42 r. 12 RHC - Application by defendants to amend or vary order of Court to reduce rate of interest to 8% per annum on judgment debt - Whether O. 42 r. 12 applicable to Court order made pursuant to s. 257 of the National Land Code.

PRACTICE & PROCEDURE: Appeal by defendants - SAR ordering that land be auctioned at reserve price based on valuation of government's valuer - Dispute on valuation of land - Whether decision of SAR proper.

LAND LAW: Public auction of land - Dispute on valuation - Conflicting valuation by defendants' valuers and government's valuer - SAR relying on valuation of government's valuer to fix reserve price - Contention that defendants should be allowed to cross-examine government's valuer - Authorities cited by defendants to support contention - Whether applicable - Whether SAR's decision proper.

The defendants filed two applications, the first to amend or vary a Court order to reduce the rate of interest on the judgment debt to 8% per annum on the principal sum due from 6 May 1956 until full realisation and the second was an appeal to the Judge in chambers against the decision of the Senior Assistant Registrar (SAR) ordering that the defendants' land be auctioned on 22 February 1994 at the reserve price of RM424,000.

With respect to the first application, the defendants contended that the pre 12 December 1986 amendment in O. 42 r. 12 of the Rules of the High Court 1980 (RHC) limiting the rate of interest to 8% per annum was applicable to them. The defendants cited three authorities in support of their contention. With respect to the appeal, the plaintiffs' valuer and the defendants' valuer had valued the land at RM275,000 and RM850,000 respectively. In view of the dispute the Court appointed independant valuers to appraise the land and fixed the reserve price at RM424,000 in accordance with the valuation. The defendants contended that as there was a wide difference between the valuation of the

defendants' valuers and the government's valuers the SAR should not have adopted the valuation of the latter without allowing defendants' Counsel to cross-examine the government's valuers. The defendants again cited authorities to support their contention.

Held:

[1] On the issue of interest, the authorities cited by the defendants were totally irrelevant and inapplicable to the current application in view of the *ratio decidendi* by the Supreme Court in *Malaysian International Merchant Bankers Berhad v. Dhanoa Sdn. Bhd.* [1988] 1 MLJ 257 which held that O. 42 r. 12 of the RHC is inapplicable to any order for sale by a Court pursuant to s. 257 of the National Land Code (NLC) as in the present case. The Court was bound by the Supreme Court decision which was wholly on point and clearly in favour of the plaintiffs being awarded the contractual rate of 14% per annum interest on the judgement debt.

[2] With regard to the issues raised on appeal, the Court found the authorities cited did not in any way assist the defendants as they were not on point. To apply the rationale of the two cases in the present case would, not only be contrary to evidential principles, but also have the effect of opening the floodgates in allowing a *viva voce* mini trial on the issue of reserve price of lands ordered by the Court to be sold under s. 257 of the NLC, thus permitting the parties in some cases yet another procedural device to hold up and delay the Court's function in public auctions. According to the SAR's record, two hearing dates had in fact been fixed to enable Counsels to argue on the issue of the reserve price which was postponed at the request of defendants' Counsel. Futhermore, this matter had been outstanding for over ten years which had given the Court the impression that the defendants's challenge on the reserve price was yet another attempt to delay the resolution of the matter.

[3] It was the Court's view that when a dispute arises in respect of the reserve price of land it would be sufficient, and the Court ought in fairness to both parties, to appoint the Court's own valuer which was done in the current matter. The government's valuers were independant valuers who had given relevant details of the comparative value of the four pieces of land adjacent to the said land which was the latest valuation on the said land. Even if the land was worth substantially more than the reserve price it was expected that the price eventually bidded would, at a properly conducted auction, reflect a higher real market value considering the bidders at auctions were essentially business-wise men. There was nothing to prevent the defendants from martialling their own group of bidders to bid at a higher value at the auction.

[Defendants' applications dismissed with costs. SAR's decision confirmed].

Cases referred to:

Malayan United Bank Berhad v. Mohd. Salleh Bin Mohd Yusoff & Ors. [1988] 3 MLJ 165 ***(dist)***

United Malayan Banking Corporation Bhd. v. Mideast Development Sdn. Bhd & Ors. [1991] 1 MLJ 55 ***(dist)***

Supreme Finance (M) Bhd. v. Koo Sin Ken [1987] 1 MLJ 296 ***(dist)***

Malaysian International Merchant Berhad v. Dhanoa Sdn. Bhd. [1988] 1 MLJ 257 ***(foll)***

Tay Bok Choon v. Tahansan Sdn. Bhd. [1987] 1 MLJ 433 ***(dist)***

Ting Ling Kiew & Anor. v. Tang Eng Iron Works Co. Ltd [1992] 2 MLJ 217 ***(dist)***

Pentadbir Tanah Daerah Petaling v. Glenmarie Estate Limited [1992] 1 MLJ 331

Legislation referred to:

National Land Code, s. 257

Rules of the High Court 1980, O. 42 r. 12

For the plaintiff - Annie Kon Lu Choo; M/s. Chin Eng & Co.

For the defendant - George C. Proctor; M/s. Y. S. Woo & Proctor

JUDGMENT

Vincent Ng Kim Khoay J:

The defendants' application per summons-in-chambers dated 1 May 1993 (Encl.49) and their appeal to Judge in chambers dated 14 January 1994 (Encl. 63) were together heard by me on 24 February 1994.

Enclosure 49 seeks to have the order of Court dated 5 May 1986 amended/varied to carry a (reduced) rate of interest of 8% per annum on the principal sum due on the judgment debt from 6 May 1986 until full settlement of all outstanding monies owing.

It was the defendants' contention that the pre 12 December 1986 amendment in O. 42 r. 12 of the Rules of the High Court 1980 ("RHC") limiting the rate of interest to 8% per annum should be applicable to the said judgment against them.

In support of their contention Counsel for the defendants cited three cases, namely: *Malayan United Bank Bhd.. v. Mohd. Salleh bin Mohd Yusoff & Ors.* [1988] 3 MLJ 165, *United Malayan Banking Corporation Bhd v. Mideast Development Sdn. Bhd. Ors* [1991] 1 MLJ 55 and *Supreme Finance (M) Bhd. v. Koo Sin Ken* [1987] 1 MLJ 296. The first two authorities are totally irrelevant and inapplicable to the current application and the third case of Supreme Finance (M) Bhd. is also inapplicable as it only concerned the issue of interest on the principal sum payable in an **Order to show cause** why the land should not be sold by public auction, rather than (as in the present case) interest on the principal sum in respect of an **Order of sale** by public auction under s. 257 of the National Land Code. This distinction is material in view of the ratio decidendi in the case of *Malaysian International Merchant Bankers Bhd. v. Dhanoa Sdn Bhd.* [1988] l MLJ 257 which held that O. 42 r. 12 of RHC is inapplicable to any Court order made pursuant to s. 257 of the National Land Code. I am bound by the Supreme Court decision in *Malaysian International Merchant Bankers Bhd (ibid)* which is wholly in point and clearly in favour of the plaintiffs being awarded the contractual rate of 14% p.a. interest on the judgment debt, as per the said Order of 5 May 1986.

In the event the defendants' application under Enclosure 49 was dismissed with costs to the plaintiffs.

Enclosure 63 is an appeal to the Judge in chambers against the decision of the Senior Assistant Registrar given on 12 January 1994 ordering that the property known as lot 3730 H.S.(D) 247 Town of Tanjong Bungah North East District, Pulau Pinang (the "said land") be auctioned on 22 February 1994 at the reserve price of RM424,000.

Stated briefly, the defendants' case is that the plaintiffs' valuer Messrs Khong & Jaafar Sdn. Bhd. had made a valuation and fixed the sum of RM275,000. as the value of said land as at 23 July, 1993 (see Encl. 52 Exh. 'NHP-I'), whereas the defendants' valuer, A. Michael-Arman & Co., had valued the land at RM850,000 as at 3 June, 1993 and 5 November 1993 (Encl. 51 Exh.'P-1A & B and Encl 57 Exh.'PCO-1'). Following this dispute on the reserve price, the Court appointed Messrs Jurunilai Bersekutu to appraise the said land and the latter had valued the said land at RM424,000. as at 5 January 1994. This was the value taken as the said reserve price by the SAR for 22 February 1994 auction.

The crux of the defendants' contention is that though the Court considered Messrs Jurunilai Bersekutu to be an independent Government valuer, yet because of the wide differential of the valuation between valuers A. Michael-Arman & Co. and Messrs Jurunilai Bersekutu the Senior Assistant Registrar should not have adopted the valuation of the latter without allowing the defendants Counsel to cross-examine the valuer from Messrs Jurunilai Bersekutu who made the valuation.

The cases of *Tay Bok Choon v. Tahansan Sdn.* Bhd. [1987] 1 MLJ 433 and *Ting Ling Kiew & Anor. v. Tana Eng Iron Works Co. Ltd.* [1992] 2 MLJ 217 were cited by defendants' Counsel in support of his contention that:

(a) by adopting the Jurunilai's report the Senior Assistant Registrar had made a finding of fact; and
(b) the SAR should not have made a finding of fact without permitting the right to cross-examine the valuer concerned.

I hold that both the above authorities cited do not in any way assist the defendants, as *Ting Ling Kiew & Anor. (ibid)* was a case in which the central issue was the allegation of fraud or intention to defraud whereas *Tay Bok Choon v. Tahansan Sdn. Bhd. (ibid)* concerned the trial of a civil proceeding in a winding up petition. To allow the rationale in any of these two cases to apply here would, not only be contrary to evidential principles, but also have the effect of opening the proverbial floodgates in allowing a viva voce mini trial on the issue of reserve price of lands ordered by the Court to be sold under s. 257 of the National Land Code; and thus permitting the parties in some cases yet another procedural device for use to hold up and delay the Court's functions in public auctions. It is my view that when a dispute arises in respect of the reserve price of land (such as in the instant case) it would be sufficient, and the Court ought in fairness to both parties, to appoint the Court's own valuer. This has been done in the current matter.

The rationale of the decision in both the above cases clearly ought not to apply in a case such as the case at hand which concerned only the

report of a valuer to assist the Court to fix the estimated value of a piece of land ordered to be sold under the supervision of the Court; indeed, only a mere report (even if appended to short formal affidavit) which contains an admixture of opinion and expertise rather than evidence *per se*.

As such, applying the above principles and also for the following undermentioned reasons, I dismissed the defendants' appeal in enclosure 63 and confirm the decision of the Senior Assistant Registrar given on 12 January 1994

(i) The said Messrs Jurunilai Bersekutu was an independent valuer appointed by the Court and whichever party eventually paid (through the Court) the fee for this valuer is immaterial.

(ii) Messrs Jurunilai Bersekutu had given relevant details of the comparative value of four pieces of land adjacent to the said land (see page 87 of the report and the case of *Pentadbir Tanah Daerah Petaling v. Glenmarie Estate Limited* [1992] 1 MLJ 331) whereas the report of A. Michael - A. Arman & Co. was highly speculative and nabulous to say the least. Indeed page 8 of this report merely talks about, to quote: "the interest shown by foreigners, particularly from Taiwan, Japan, Korea and Hong Kong for Mount Evergreen lots" and "the market for such lots appears set for further optimism and price increases" and also the area being "so much sought after mainly because of its dainty and beautiful panoramic sea views". Obviously, such fancy comments and liberal use of felicitous expressions without any tangible and persuasive basis should not be the foundation of a valuation report worthy of acceptance by a Court. A piece of land that permits "beautiful panoramic sea views" often entails a land that sits on a steep gradient with all its concomitant development problems. Indeed, according to the Valuation Report by Messrs Jurunilai Bersekutu the said land was "a plot of land which is regular in shape, **steep slope in terrain** and similar with its surrounding"

(iii) Even if the said land is worth substantially greater than the sum RM424,000 it is only to be expected that the price eventually bidded for same would, at a properly conducted auction, reflect its higher real-market value, considering that bidders at auctions are essentially business-wise men.

(iv) The valuation of Jurunilai Bersekutu made on 5 January 1994 was the latest valuation on the said land.

(v) According to Senior Assistant Registrar's record he had in fact fixed 22 December 1993 and 5 January 1994 to enable Counsels to argue on the issue of the reserve price of the said land but were postponed at the request of the defendants' Counsel.

(vi) If the value of the said land is in fact that much higher, there is nothing to preclude the defendants, on their own, from marshalling their own group of bidders to bid at a higher value at the auction.

(vii) This matter had been outstanding for over ten (10) years past and this challenge by the defendants on the said reserve price had regrettably given the Court the impression that it was yet again another attempt to delay the resolution of the matter.

In the event, the appeal was dismissed with costs to the plaintiff. The learned Senior Assistant Registrar's decision on the reserve price of the said land was thus confirmed.